To: Clerk of the Michigan Supreme Court
From: Josh Ard
Law Office of Josh Ard, PLLC
1340 Trotters Lane, Williamston, MI 48895
(517) 655-9782
josh@ardlaw.com
Re: Writing as a prophylactic in the proposed changes in ADM File No. 2009-06
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Several proposed changes to the Michigan Rules of Professional Conduct included in ADM File No. 2009-06 emphasize writing as a client protection. Ironically, writing is not likely to provide protection for the types of clients who are most in need of protection.

In this comment, I will discuss the apparent purpose of the protection rules, how writing is not always a suitable method to enhance client protection, and offer two alternative suggestions.

Background

I am an attorney and a former professor of linguistics, last at the University of Michigan. I am conversant with current issues in language and the law as a member of the International Association for Forensic Linguistics. I am a former chair of the Elder Law and Disability Rights Sections, the Consumer Law Section, the Professional Standards and Legal Education Committee, and the Unauthorized Practice of Law Committee of the State Bar. I am a council member of the Probate and Estate Planning Section and a former council member for the Administrative Law Section. I am currently a member of the Representative Assembly and the Professional Ethics Committee of the State Bar and have taught numerous classes in three law schools. As much as I might wish to say that I speak for others, I only speak for myself in these remarks. My various experiences have led me to notice that the general direction of changes in proposed revisions to the Michigan Rules of Professional Conduct is erroneous.

The purposes of restrictions on communications in the Model Rules

A fundamental question is what the communicative mechanisms in the rules are designed to accomplish. There seem to be two primary goals:

- To facilitate informed consent by the client or potential client before any agreement is consummated
- To provide a record that the client could revisit at any time after consummation

It is far from clear that writing is always the best method for accomplishing either goal for ordinary persons. Writing as a panacea has been criticized for at least 2400 years, going back to Plato's *Phaedrus*, in which he says that Socrates described writing as a drug for memory. For the distinct populations of attorneys and appellate judges, writing is presumably an ideal means of accomplishing these goals, because we are quite practiced and adept with writing. That is not

necessarily the case for others. I assume that the rules are not designed to protect the most sophisticated clients, such as corporations. Such clients have ample means to protect themselves. Rather, the type of client who is most in need of the protection of the rules is the ordinary, unsophisticated individual client. In particular, some sub-groups are most at risk. Such vulnerable clients include many elderly people and many people with disabilities.

Examples of proposed changes

First, let us consider some of the changes.

MRPC 1.5(b) changes the rule that fees be disclosed *preferably in writing* to delete the adverb *preferably*. Also,

> Any changes in the basis or rate of the fee or expenses must also be communicated to the client in writing

A nonrefundable fee for the sole purpose of a commitment to service must be in writing in 1.5(e). A division of fees between lawyers not in the same firm must be in writing in 1.5(f).

The Attorney Grievance Committee's proposals are ignored in this analysis.

Writing is also a prophylactic for conflicts of interests involving current clients in 1.7.

> (4) each affected client consents in writing after the lawyer discloses the material risks presented by the conflict of interest and explains any reasonably available alternatives, or the lawyer promptly affirms a client's oral consent in a writing sent to that client.

This replaces the current

> the client consents after consultation

In 1.8 a change would require advising clients in writing about independent legal counsel:

> (2) the client <u>is advised in writing that it is appropriate to seek the advice of independent legal counsel concerning the matter and</u> is given a reasonable opportunity to seek ~~the~~ such advice ~~of independent counsel in the transaction~~; and

and require consent in writing

> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents <u>in writing</u> ~~after consultation~~, except as permitted or required by <u>these</u> ~~R~~<u>r</u>ule<u>s</u> ~~1.6 or Rule 3.3~~.

This last change, repeated elsewhere in the proposal, indicates that writing provides better protection than consultation. The same substitution is proposed for part of 1.8(e):

> (1) the client consents <u>in writing</u> ~~after consultation~~;

and (g):

> (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or, in a criminal case, an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents <u>in writing</u> ~~after~~

~~consultation~~, ~~including~~ the lawyer disclos~~ur~~es of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Empirical matters

Fact patterns commonly found in litigation, practical experience of attorneys, and scientific research all indicate that writing is not a panacea either for explanations or for memorializing agreements.

In many contracts, writing serves more to obfuscate the terms rather than to elucidate them. A common pattern is for a plaintiff to complain that the written contract, which contains an integration clause, failed to correspond to the oral inducements. Courts have generally dismissed these claims, holding that the plaintiff had a duty to read the contract before agreeing to it or that the parole evidence rule or an integration clause precluded such questions. Note that the reverse pattern virtually never appears: Plaintiffs do not claim that they understood the written contract and remembered it perfectly but were misled by some of the spoken information. Furthermore, scholarly research has found a deliberate move on the part of some entities to draft written contracts in a manner to make interpretation more difficult. The lesson to learn from this is that many ordinary people find it much easier to learn from what is said rather than what is written.

I have spent many years working with elderly clients, many in the Sixty Plus Elderlaw Clinic of Thomas M. Cooley Law School. One of my tasks as an instructor was to educate our students about the many clients who either cannot or do not read texts of even moderate complexity. If a student asked a client, "Did you read and understand the draft?", that often called upon the client to lie or to embarrass himself.

Some persons, including a disproportionate share of the elderly, find the act of reading challenging, if not impossible. Several factors, such as declining visual acuity and lack of practice, play a part. Changes in language processing abilities make reading a more difficult task for some. For elderly persons in particular, writing is unlikely to facilitate understanding. Reading ability is an acquired skill, which requires practice to maintain. Persons with poor education are unlikely to ever become adept at reading critically.

For those persons, writing is also not an effective mnemonic device. If something written cannot be easily processed, it is not likely to aid much in recall.

Suggestion 1: Stress Communicative Goals Rather than Techniques

Rather than assuming that writing is automatically the best mechanism for both goals, it is more sensible to emphasize the goals and deemphasize any particular mechanism:

- Lawyers must present information in a manner appropriate for the client to make an informed decision
- Lawyers must present a record of any agreement in some fixed, tangible means that allows the client to review the details of the agreement

For example, for many clients, a discussion is much more likely to be informative if it is oral, encouraging questions and answers. For clients with difficulty reading effectively, a video recording is more likely to be helpful than a written record. For a client with poor eyesight, an audio recording might be more useful. The medium depends on the client. It makes no sense to provide a DVD of the conversation to a person who doesn't have a DVD player or a CDROM copy of a written agreement to a person without a computer.

Another step that would make sense is to follow the example of the ABA and include the notion of informed consent in the rules and provide a definition.

Suggestion 2: incorporate the list of unfair, unconscionable, or deceptive acts given in the Consumer Protection Act into the Michigan Rules of Professional Conduct

The legislature has already addressed the question of how to discourage deception in marketing to consumers. The results are reflected in the Consumer Protection Act. This act is commonly believed not to apply to attorneys because we belong to a profession. See, for example, *Nelson v Ho*, 222 Mich App 74 (1997). That case held that the Consumer Protection Act could not be brought against a physician for a matter that was arguably malpractice, but suggested in dicta that "only allegations of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of the entrepreneurial, commercial, or business aspect of a physician's practice may be brought under the MCPA." *Nelson* at 82. Even that possibility might be precluded by *Smith v Globe Life Insurance Co.*, 460 Mich 446 (1999) and subsequent cases which held that the exemption in MCL § 445.904 precludes a Consumer Protection Act claim against any regulated activity. The ultimate regulator of attorneys is, of course, the Michigan Supreme Court. Thus, it would be appropriate for the Court to incorporate these unfair, unconscionable, or deceptive acts into the regulations governing attorneys' behavior. Attorneys should be held to a higher ethical standard than, say, used car dealers. If these methods, acts, or practices are unfair, unconscionable, or deceptive, it seems trivially obvious that attorneys should be sanctioned for using them.

Certainly some of the forbidden activities would be highly unlikely to ever arise in marketing activities by attorneys. For example, attorneys are not likely to use musical performances or biodegradable products in their marketing, as biodegradable contracts are unlikely to be attractive. Some would require expansive readings to apply to attorneys. Attorneys do not really provide replacement parts, but do provide amended provisions in contracts and governing instruments. I have learned that the Attorney General and the State Bar are investigating a trust mill that allegedly falsely tells potential customers that the new Michigan Trust Code requires an amendment that they will kindly draft in order for existing trust instruments to remain valid. This could be construed as a violation of § 3(1)(j) by representing that a replacement or repair service is needed when it is not. Some provisions are directly applicable to attorney marketing, such as

(n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.
(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.
(t) Entering into a consumer transaction in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it.
(y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.
(z) Charging the consumer a price that is grossly in excess of the price at which similar property or services are sold.
(aa) Causing coercion and duress as the result of the time and nature of a sales presentation.

Generally, engaging in marketing violations do not implicate malpractice. Imagine that an attorney falsely claimed that a certain trust was endorsed by Oprah. That would violate (c), by representing that the service has approval that it does not have. If the quality were reasonable, there would not necessarily be malpractice even though the inducement was based on an outright lie.

It seems to be much easier in practice to enforce a result-based rule such as

Do not cause a probability of confusion or misunderstanding about fees

than to enforce rules requiring communicative techniques that would facilitate understanding or rules forbidding communicative techniques that might obfuscate matters. One reason for this is that the effects of different techniques certainly depend on both the individual attorney and individual client. There is no uniform solution. In some instances, the Federal Trade Commission recognized that it would be impossible to predict the entire range of deceptive techniques that could be used and concentrated on results instead. That approach makes sense for the Court to adopt in these matters.

I certainly realize that the approach I am suggesting is rather different from what has been done before, taking individual variation of clients into account. I submit that it would be a definite improvement over the current rules.